Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1993

FRANCIS PICRAY, JR.,

PETITIONER

vs.

CITY OF DES MOINES, IOWA,
REGINALD V. SIPFLE, HAROLD E. SMITH,
JERRY THOMPSON, NELDA MICKLE,
PAT KOZITZA, RICHARD WILKEY,
EDDIE L. CARR AND WILLIAM McLAUGHLIN,
Individually and as Agents
For the City of Des Moines, Iowa,

RESPONDENTS.

TO THE SUPREME COURT OF IOWA

PETITION FOR WRIT OF CERTIORARI

FRANCIS PICRAY, JR.
2920 Cleveland
Des Moines, Iowa 50317
Telephone (515) 266-7387
PETITIONER WITHOUT COUNSEL

QUESTIONS PRESENTED

I. PICRAY WAS DENIED EQUAL OPPORTUNITY AND DUE PROCESS WHEN HE WAS REFUSED ACCESS TO THE CIVIL SERVICE COMMISSION, WHICH IS CHARGED UNDER IOWA LAW AS BEING THE SOLE DECISION-MAKER CONCERNING HIS APPLICATION FOR EMPLOYMENT UNDER THE CIVIL SERVICE STATUTES.

II. THE REFUSAL OF THE IOWA COURTS TO FOLLOW IOWA STATUTES GUARANTEEING EQUAL "OPPORTUNITY" IN EMPLOYMENT IS A DENIAL OF FEDERAL DUE PROCESS AND EQUAL PROTECTION, AS IS THE REFUSAL TO FOLLOW THEIR OWN PRIOR EDICT.

LIST OF PARTIES

Francis Picray, Jr. is an eligible individual who made application for employment with the City of Des Moines.

City of Des Moines, Iowa is a municipal corporation who advertised a position for which Picray is eligible.

Reginald V. Sipfle is a clerk for the City of Des Moines and selected by the Des Moines Civil Service Commission to act as its clerk, prohibited by law from being on the commission, or involvement in the decision making process.

Harold E. Smith is City Engineer for the City of Des Moines, and the department head in which Picray was employed.

Jerry Thompson is/was personnel director for the City of Des Moines, custodian of employment records.

Nelda Mickle is an assistant city attorney for the City of Des Moines, and legal advisor to civil service clerk Sipfle.

Pat Kozitza was assistant personnel director for the City of Des Moines under Jerry Thompson and Richard Wilkie.

Richard Wilkey was the City Manager for the City of Des Moines and responsible only to the city council.

Eddie L. Carr was the office manager under Mr. Smith in the department in which Picray had been employed.

William McLaughlin was the maintenance supervisor in Mr. Smith's department who was hired to discharge Picray and assume control thereof.

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EDDIE L. CARR AND WILLIAM McLAUGHLIN,
Individually and as Agents
For the City of Des Moines, Iowa,
RESPONDENTS.

TO THE SUPREME COURT OF IOWA

Francis J. Picray, Jr. petitioner herein, petitions this Court to issue Writ of Certiorari to the Supreme Court of Iowa, to review and reverse the decisions below.

Petitioner respectfully suggests that this case is one which should be

summarily returned to the Iowa Courts with direction that Petitioner be allowed to develop and present his case on the merits.

OPINIONS BELOW

This petition seeks review of proceedings in the Iowa Courts which effectively reached final decision thereby denying Picray hearing on the merits by entry of an order by the Supreme Court of Iowa, dated December 3, 1993. That decision denied further review of a decision by the Iowa Court of Appeals. Such order is attached. The opinion of the Iowa Court of Appeals dated October 5, 1993, is attached. Entries of the Iowa District Court concerning summary judgment are attached.

JURISDICTION

The Jurisdiction of this Court is invoked pursuant to 28 USC Section 1257.

Iowa District Courts are courts of general jurisdiction under I.C.A. Chapter 602. All appeals in Iowa from final judgments are to the Iowa Supreme Court under Rule of Appellate Procedure 1 of that Court. The Supreme Court may then, under Rule of Appellate Procedure 401 refer the case to the Iowa Court of Appeals. A decision of the Iowa Court of Appeals can, pursuant to Rule of Appellate Procedure 402, be then addressed to the Iowa Supreme Court. This was done.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendments V and XIV

42 U.S.C. 1983

I.C.A. Section 729.4(1), which provides

> "1. Every person in this state is entitled to the opportunity for employment on equal terms with every other person. . . ."

I.C.A. Section 400.8. (Only those applicants certified by the commission are eligible).

I.C.A. Sections 400.4 & .11. (Clerk is not, and cannot be, a member of the commission)

I.C.A. Chapter 70.1(1), (2), (4). (War veteran given preference).

STATEMENT OF THE CASE

NATURE OF THE CASE: In a previous case, Picray sued the City of Des Moines for wrongful termination and defamation because of a subjective Personnel Action File with a letter attached which contained untrue and unfounded allegations concerning him. That case was settled out of court by the City making payment to Picray of $45,000. plus costs, and a Release agreement was entered.

Years later, Picray responded to an ad by the City for plumber in a different department. This position is a civil service position. By Iowa statute, the Civil Service Commission is lodged with sole jurisdiction to test and determine the qualifications of all applicants. Defendants Sipfle and Mickle, acting for

the City, and by law not members of the Commission, improperly refused to submit the Picray application to the Commission. Picray commenced the present action.

The City, Sipfle and Mickle unlawfully denied him access to the civil service commission, thereby denying Picray due process and equal opportunity to apply and to be considered.

COURSE OF PROCEEDINGS: Picray filed his Petition pro se. The City filed for summary judgment on the alleged basis that Picray was suing for the tort of failure to rehire and that Iowa has no such tort. Summary judgment was granted, and affirmed by the Iowa Court of Appeals. The Supreme Court of Iowa denied Picray's Application for Further Review.

STATEMENT OF FACTS: Prior to June 28,

1982, Appellant Picray was employed by the City of Des Moines, a municipality and therefore a public employer. During that employment, Picray had been vocally critical of his supervisors, and had gone "public", in a manner which caused him to be labeled a "whistleblower" regarding budgetary fraud. In retaliation for his having gone public with his verified criticism he was terminated. Picray commenced legal action against the City, for wrongful termination and defamation, which legal action was widely publicized. That litigation was terminated by settlement in which the City paid to Picray $45,000. and costs and a Release was entered into. Damage for defamation was included in such settlement. The general printed Release form furnished by the City was specifically modified by the

City in typing to include the following as the specific reason for the Release:

> "The termination of my employment by the City of Des Moines on June 28, 1982 including all claims which the undersigned has made in the Iowa District Court for Polk County as Law No. C.L. 50-29059 and Equity No. 18-10585 (Civil Service Appeal).

In 1989, Picray learned that a position of plumber was available with the City in the parks department, and he made application. On or about July 29, 1989, after telephone inquiry, he received a letter from R.V. Sipfle for the City which stated:

> "During your previous employment with the City of Des Moines, you left under circumstances which caused your file to be marked not eligible for rehire. Therefore, your application for position of plumber will not be processed further." (Emphasis added).

In response, Picray inquired as to who made the decision to so mark the file

and stating that such marking was improper.

In answer, Sipfle mailed to him the original Personnel Action Form (for which Picray had sued and collected damage).

Picray, acting pro se, filed his verified Petition in this action. The City admitted that "the decision not to re-hire was based upon the Personnel Action Form dated June 28, 1982," for which the City chose not to litigate.

The City again filed for summary judgment mis-characterizing the action as one for failure to re-hire. The Court granted Summary Judgment. (By Iowa law, to be hired or re-hired, one must first apply). (I.C.A. 400.8)

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

The issues involved are of exceptional character and of great

public importance in that they address: (1) whether due process and equal protection of law guarantee him access to the sole decision-maker charged by state law with making the decision concerning possible employment, (I.C.A. 400.17) and (2) whether the refusal of Iowa Courts to apply their own statute guaranteeing equal opportunity for employment, and their own edict as to who is the decision-maker, are a denial of federal equal protection and due process.

REASONS SUPPORTING ISSUANCE OF THE WRIT

I. PICRAY WAS DENIED EQUAL OPPORTUNITY AND DUE PROCESS WHEN HE WAS REFUSED ACCESS TO THE CIVIL SERVICE COMMISSION, WHICH IS CHARGED UNDER IOWA LAW AS BEING THE SOLE DECISION-MAKER CONCERNING HIS APPLICATION FOR EMPLOYMENT UNDER THE CIVIL SERVICE STATUTES.

Because of actions of the Respondent City, Mickle and Sipfle, Picray was denied access to the Des Moines decision-maker (the Civil Service Commission, I.C.A. 400.17). The City employees who made the decision to deny him access to the Commission are not members of the commission, and under Iowa law cannot be. The lawful decision-maker under Iowa law (the Civil Service Commission) was never allowed to make the determination that: 1. Picray was not eligible for re-hire, or 2. That Picray's personnel file could or should be marked "Not eligible for re-hire". That determination was unlawfully made by two city employees (Sipfle and Mickle), who lacked authority under law to make that decision. See, Downs v. Bd. of Trustees of Police, Inc., 312 N.W.2d 563, 566 (Iowa 1981).

Thus, the right of Picray which was violated by Defendants, and which the Petition clearly outlined to the Iowa Courts, was not the failure to hire or re-hire (which decision was never lawfully made because the application never reached the decision-maker), but rather was the denial of access to, and the "opportunity" to be considered by, the lawful decision-maker (the Civil Service Commission).

Denial of that opportunity violated Picray's rights to Federal Due Process and Equal Protection guaranteed by the Fifth and Fourteenth Amendments.

The Iowa Courts found that equal protection and equal opportunity are guarantees extending only to members of certain classes. Because Picray did not claim membership of a protected class he

was found to have no basis to claim discriminatory treatment. Such finding is a denial of equal protection and equal opportunity. I.C.A. 729.4(1); Cochran v. Kansas, 316 U.S. 255 (1942); Sawyer v. Sigler, 320 F. Supp. 690, 698 (DC Nebr 1970). Although relative treatment relating to members of certain classes may be "suspect", and thus viewed with higher scrutiny, Picray submits he does not have to be a member of a named class to be guaranteed equal treatment and opportunity! Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). Such guarantee to equal treatment and opportunity extends to former employees. Rutherford v. American Bank of Commerce, 565 F.2d 1162 (CA 10 1977).

Chapter 70 of the Code of Iowa does guarantee preference to veterans in

public employment. Picray was entitled to such preference and made such claim in his application. Because his application was not allowed to the Commission, it was never considered. The guarantee was denied by one not empowered by law to make such determination.

Denial of consideration for public employment, if arbitrary and without rational basis, is a deprivation of a liberty right without due process. 14A CJS, Civil Rights, 143.

A discharge of a public employee accompanied by stigmatizing charges, or injury to reputation, which forecloses or interferes with future employment is actionable. 14A CJS, Civil Rights, 144.

Under Section 1983, factual determinations must be made by a jury, where demand has been made. 14A CJS,

Civil Rights, 310.

II. THE REFUSAL OF THE IOWA COURTS TO FOLLOW IOWA STATUTES GUARANTEEING EQUAL "OPPORTUNITY" IN EMPLOYMENT IS A DENIAL OF FEDERAL DUE PROCESS AND EQUAL PROTECTION, AS IS THE REFUSAL TO FOLLOW THEIR OWN PRIOR EDICT.

The first sentence of Iowa Code Section 729.4(1) provides:

> "1. Every person in this state is entitled to the opportunity for employment on equal terms with every other person." (Emphasis added).

The Iowa Courts held that Picray had to fall within a named class in order to claim denial of "opportunity" on "equal terms" with "every" other person for employment, and that because he did not allege and prove that he was a member of a named class he had no basis for claim of denied "opportunity" under the statute. That interpretation itself

begets discrimination! By interpreting the statutory guarantee to be meaningless and superfluous the Iowa Courts have denied Picray of the process he is due as a matter of federal due process.

By purporting to limit relief to members of the named classes, and not recognizing the specific guarantee arising from the first sentence, the Courts below have held that ONLY those persons in the named classes are guaranteed equal treatment. By this construction, they have created a new discrimination - a new discrimination that flies in the face of the Iowa statute and federal law!

In Downs v. Bd. of Trustees of Police, Inc., 312 N.W.2d 563, 566 (Iowa 1981) the Iowa Supreme Court stated that:

> "Civil service commissions . . . are charged by law with the

> responsibility of determining the qualifications of persons seeking appointment to civil service positions. . . . " (emphasis added).

In this case, determination of qualifications was made by an employee who was not a member of the commission. That violates Iowa statute. That violates Iowa precedent.

Matters concerning federal due process are federal issues and must be determined according to federal, not state, standards. Hicks v. Feiock, 108 S.Ct 1423 (1988). The refusal of the Iowa Courts to apply and abide by Iowa statutes and their own prior edict is a denial of Federal Due Process. Hicks v. Oklahoma, 447 U.S. 343, (1980).

CONCLUSION

WHEREFORE Petitioner prays the Court issue Writ of Certiorari to the Iowa Supreme Court and order and direct that

it vacate it's order affirming the granting of summary judgment adverse to Petitioner and take those actions and issue those orders incidental to requiring that this matter be submitted to a trial by jury on the merits.

Most respectfully submitted,

Francis J. Picray Jr

Francis Picray, Jr.
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Des Moines, Iowa 50317
Telephone (515) 266-7387

Petitioner.

Filed Dec 03 1993

Clerk Supreme Court

IN THE SUPREME COURT OF IOWA

No. 3-431 / 92-1709

FRANCIS J. PICRAY, JR.,

Plaintiff-Appellant,

vs.

CITY OF DES MOINES, IOWA, REGINALD V. SIPFLE, HAROLD E. SMITH, JERRY THOMPSON, TERRANCE HOPKINS, NELDA MICKLE, PAT KOZITZA, RICHARD WILKEY, EDDIE L. CARR and WILLIAM McLAUGHLIN, Individually and as Agents for the City of Des Moines,

Defendants-Appellees.

ORDER

After consideration by this court en banc, further review of the above-captioned case is hereby denied.

Dated this 3rd day of December, 1993.

THE SUPREME COURT OF IOWA

By _____
Arthur A. McGiverin,
Chief Justice

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Filed Oct 05 1993
Clerk Supreme Court

IN THE COURT OF APPEALS OF IOWA

No. 3-431 / 92-1709

FRANCIS J. PICRAY, JR.,

Appellant,

Appeal from the Iowa district court for Polk County, Glen Pille, Judge.

The plaintiff brought this action against the City of Des Moines claiming city employees violated his civil rights by not hiring him. The plaintiff also claimed the defendants tortiously failed to hire him. The plaintiff now appeals the district court's orders granting the defendant's motions for summary judgment. **AFFIRMED.**

Francis J. Picray, Jr., Des Moines, pro se.

Bruce E. Bergman, City Solicitor, and Emily Gould Chafa, Assistant City Attorney, Des Moines, for appellee.

Heard by Donielson, P.J., and Schlegel, J., and Perkins, S.J.*

PER CURIAM

This involves Francis Picray, Jr.'s, suit against various current and former employees of the City of Des Moines. Picray claimed in his petition, inter alia, the City refused to hire him in violation of his civil rights under 42 U.S.C. §§ 1983, 1985, and 1986 (1988) and the Fair Labor Standards Act of title 29 U.S.C. Picray also claimed the employees tortiously failed to consider his application for employment.

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

Picray is a former city employee who filed suit against the City for wrongful discharge. Apparently the City settled out of court. Picray subsequently applied to the City for an advertised position. After he heard no response, Picray called the City and allegedly learned the City would not process his application because his file was marked not recommended for rehire. Picray then brought this action against the City.

The defendants denied Picray's allegations and claimed they were entitled to qualified immunity. They also claimed Picray had failed to state a claim upon which relief could be granted. The district court granted defendant Terrence Hopkins' motion for summary judgment.

The remaining defendants filed a

separate motion for summary judgment based, in part, on the grounds of qualified immunity and Picray's failure to allege any specific deprivation of his rights under federal law. At this point in the proceedings, Picray was represented by counsel. In Picray's motion for summary judgment he agreed he failed to specify any deprivation of rights under 42 U.S.C. §§ 1983, 1985, 1986 and the Fair Labor Standards Act. The court granted the defendants' motion as to Picray's claim under federal law.

The defendants subsequently filed a motion for summary judgment as to Picray's claim they tortiously failed to hire him. Acting pro se, Picray resisted the motion. The court granted the motion on the ground Picray failed to state a cause of action for which relief could be

granted. Picray appeals from the court's orders granting the defendants' motions for summary judgment except, apparently, the cause of action against Terrance Hopkins.

We review a summary judgment ruling to determine "(1) whether a genuine issue of material fact exists, and (2) if the law was correctly applied." Ottumwa Housing Auth. v. State Farm Fire, 495 N.W.2d 723, 726 (Iowa 1993). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237; Colton v. Branstad, 372 N.W.2d 184, 187 (Iowa 1985). No fact question exists if

the only dispute concerns the legal consequences flowing from undisputed facts. Brown v. Monticello State Bank, 360 N.W. 2d 81, 84 (Iowa 1984).

Picray conceded in the proceedings on the first motion for summary judgment that his petition failed to specify any violation of his rights under 42 U.S.C. 1983, 1985, 1986, and the Fair Labor Standards Act. Since he did not pursue any administrative remedies under Iowa civil rights law within the specified 180 days, he cannot pursue that claim in court. See Iowa Code section 601A.15(12) (1991) (now codified as section 216.15(12) (1993)). We find no genuine issue of material fact relating to the civil rights claims in the record. Summary judgment was appropriate concerning his civil rights claims.

Picray also alleges tortious failure to hire or tortious failure to consider his application for employment. After careful examination of the record, we find no genuine issue of material fact. We agree with the district court appellant has failed to state any statutory authority or basis for a cause of action. We therefore affirm the district court's grant of summary judgment on the tort claim.

AFFIRMED.

Filed Sept. 25, 1992

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

No. CL 91-53797

FRANCIS J. PICRAY, JR.,

Plaintiff,

CITY OF DES MOINES, IOWA,
et al.,

Defendants.

RULING ON MOTION FOR SUMMARY JUDGMENT

The above-captioned matter came on for oral arguments before the undersigned Judge reference a Motion for Summary Judgment filed July 22, 1992, by the Defendants herein. Francis J. Picray appeared pro se for the arguments made before this Court on the 4th day of September, 1992. The Defendants were represented by Assistant City Attorney

Emily Gould. The Court having reviewed the record and file herein, having heard the arguments presented, and being otherwise fully advised in the premises finds the following ruling should be entered.

STATEMENT OF THE CASE

Plaintiff filed his Petition herein on July 19, 1991, against the City of Des Moines and individually named Defendants seeking, inter alia, compensatory damages on the basis that the City of Des Moines and some or all of the individual Defendants tortiously failed to hire the Plaintiff for a position he had applied for.

As a result of a hearing pertaining to one of the named Defendants, Terrence Hopkins, the Court sustained his Motion for Summary Judgment per order filed

October 15, 1991. The Court has previously addressed a Motion for Summary Judgment by the remaining Defendants, the order addressing the same being filed by this Court on April 15, 1992. The Court notes that the issues raised in the previous Motion for Summary Judgment are different than those raised in the Motion for Summary Judgment before the Court at this time. The Court notes, per its order filed April 15, 1992, that the Court sustained the Defendants' Motion for Summary Judgment as it pertained to claims for relief under 42 U.S.C. Sections 1983, 1985, 1986 and the Fair Labor Standards Act of Title 29, U.S. Code.

The remaining Defendants filed an additional Motion for Summary Judgment with this Court on July 22, 1992, raising

different issues, including, inter alia, the issue of whether or not the Plaintiff's Petition states a claim upon which relief can be granted.

FINDINGS AND CONCLUSIONS

The undisputed findings of fact relevant to the Court's disposition of the pending Motion for Summary Judgment are those set forth by the Defendants in their Statement of Material Facts filed July 22, 1992. As such, the Court adopts the Defendants' Statement of Material Facts filed in support of Defendants' Motion for Summary Judgment on July 22, 1993 as set forth fully herein.

Having reviewed the pleadings and undisputed material facts herein, the Court concludes that the Plaintiff's Petition fails to state a cause of action upon which relief can be granted. In

essence, the Plaintiff claims that the Defendants committed an actionable tort by failing to hire the Plaintiff. The Plaintiff has provided no authority to the Court that would support such a cause of action. As noted by Defendants in their brief, Plaintiff's claim is not a cause of action at common law, and in fact the common law recognizes that the employer was entitled the right to select his employees or discharge them, at will.

Even though civil rights statutes do affect this common law right of the employer, Plaintiff has provided no statutory authority or basis for a cause of action in this court. Plaintiff has not alleged age or any other discrimination covered by any such statutes, and further is barred from maintaining an action on the basis of any

such discrimination for failure to pursue his administrative remedies. See 601A.15(12) and 601A.16(1), Code of Iowa, 1991; see also Northrup v. Farmland Industries. 372 N.W.2d 193, 197 (Iowa 1985).

Simply, the Plaintiff has provided no authority to this Court that demonstrates a cognizable cause of action in this Court for a tortious failure to rehire.

Additionally, there is no evidence before this Court that would indicate that certain Defendants (Harold E. Smith, Jerry Thompson, Helda Mickle, Pat Kozitza, Richard Wilkey, Eddie L. Carr, and William McLaughlin) took any action or committed any act relevant to the Plaintiff's claim herein within the applicable two-year statute of limitations. In fact, the uncontroverted

affidavits filed with Defendants' Motion for Summary Judgment indicates said Defendants played no role in the evaluation of Plaintiff's employment application. As such, any claims Plaintiff may have had against said individual Defendants are now barred by the statute of limitations.

Accordingly, the Court concludes the Motion for Summary Judgment filed by the remaining Defendants herein should be sustained as hereunder ordered.

ORDER

IT IS THEREFORE ORDERED that the Motion for Summary Judgment filed by the remaining Defendants herein on July 22, 1992, be and the same is hereby SUSTAINED; accordingly, the Plaintiff's Petition herein is hereby dismissed; costs are taxed against the Plaintiff.

DATED this 25th day of September, 1992.

(signed)_____
GLENN E. PILLE, Judge
Fifth Judicial District of Iowa

Filed April 14, 1992

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

No. CL 91-53797

FRANCIS J. PICRAY, JR.,

Plaintiff,

vs.

CITY OF DES MOINES, IOWA,
et al.,

Defendants.

ORDER

The above-captioned matter came before the undersigned Judge on April 8, 1992, reference a Motion for Summary Judgment filed February 4, 1992, by the remaining Defendants herein. At oral arguments before the undersigned Judge, the Plaintiff was present and represented by his attorney, James Cook. The

Defendants were represented by their attorney, City Solicitor Bruce E. Bergman. The Court having examined the file and records herein, having heard the arguments of counsel, and being otherwise fully advised in the premises finds the following ruling should be entered.

The Court notes, both as per the Resistance filed by the Plaintiff herein and as per oral statements made by his attorney at oral argument, that the Plaintiff concedes that the Defendants are entitled to summary judgment as to Plaintiff's claims for relief under 42 U.S.C. Sections 1983, 1985, 1986, and the Fair Labor Standards Act of Title 29 U.S. Code. Accordingly Defendants' Motion for Summary Judgment as to those allegations is sustained.

In all other respects Defendants' Motion for Summary Judgment is overruled.

Per the affidavits and arguments filed by the Plaintiff herein, Plaintiff's cause of action is not for a wrongful termination or for actions taken back in 1982, but for a failure to hire the Plaintiff in 1989. Apparently the basis of Plaintiff's lawsuit is a letter dated July 20, 1989, from R. V. Sipfle, a civil service administrator for the City of Des Moines, indicating that the Plaintiff was "[not] eligible for rehire." The Plaintiff has applied for a position as a plumber with the Des Moines Parks Department.

In viewing the evidence in the light most favorable to the Plaintiff, the

Court finds the Motion for Summary Judgment should be denied.

ORDER

IT IS THEREFORE ORDERED that the Motion for Summary Judgment filed by the Defendants herein on or about the 4th day of February, 1992, be and the same is hereby SUSTAINED as to any allegations made under 42 U.S.C. Sections 1983, 1985, and 1986, and the Fair Labor Standards Act of Title 29 U.S. Code; said Motion is DENIED in all other respects.

DATED this 14th day of April, 1992.

(signed)
GLENN E. PILLE, Judge
Fifth Judicial District of Iowa

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Supreme Court, U.S.
FILED
APR 22 1994
OFFICE OF THE CLERK

No. 93-1529

In The

Supreme Court of the United States

October Term, 1993

FRANCIS PICRAY, JR.,

Petitioner,

v.

CITY OF DES MOINES, IOWA, REGINALD V. SIPFLE, HAROLD E. SMITH, JERRY THOMPSON, NELDA MICKLE, PAT KOZITZA, RICHARD WILKEY, EDDIE L. CARR AND WILLIAM McLAUGHLIN, Individually and as Agents for the City of Des Moines, Iowa,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE IOWA SUPREME COURT'S ORDER DENYING FURTHER REVIEW WHEN THE IOWA COURT OF APPEALS DECISION DID NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, DID NOT DECIDE A QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH OTHER DECISIONS, AND DID NOT DECIDE ANY IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN DECIDED BY THIS COURT?

II. WHETHER THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE IOWA SUPREME COURT'S ORDER DENYING FURTHER REVIEW WHEN THE PETITION CONTAINS MISSTATEMENTS OF FACTS AND INCORRECT ASSERTIONS OF LAW, THE PETITION MEETS NONE OF THE CRITERIA FOR REVIEW BY THIS COURT AND THIS ORDER AND THE IOWA COURT OF APPEALS RULING ARE UNREPORTED AND OF NO PRECEDENTIAL VALUE?

PARTIES TO THE PROCEEDINGS

Francis Picray, Jr. was not and is not eligible for employment with the City of Des Moines.

City of Des Moines, Iowa is a municipal corporation that may have advertised a plumber position in 1989 for which Picray was not eligible.

Reginald V. Sipfle was and is Clerk to the Des Moines Civil Service Commission.

Harold E. Smith was and is the City Engineer for the City of Des Moines.

Jerry Thompson was Personnel Director for the City of Des Moines.

Nelda Mickle was and is a City Solicitor for the City of Des Moines Legal Department, and acted as legal adviser to the Civil Service Commission.

William McLaughlin has been Building Services Superintendent in the Engineering Department of the City of Des Moines since May of 1982.

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No. 93-1529

In The

Supreme Court of the United States

October Term, 1993

FRANCIS PICRAY, JR.,

Petitioner,

v.

CITY OF DES MOINES, IOWA, REGINALD V. SIPFLE, HAROLD E. SMITH, JERRY THOMPSON, NELDA MICKLE, PAT KOZITZA, RICHARD WILKEY, EDDIE L. CARR AND WILLIAM McLAUGHLIN, Individually and as Agents for the City of Des Moines, Iowa,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF IN OPPOSITION

Respondents CITY OF DES MOINES, IOWA, REGINALD V. SIPFLE, HAROLD E. SMITH, JERRY THOMPSON, NELDA MICKLE, PAT KOZITZA, RICHARD WILKEY, EDDIE L. CARR AND WILLIAM McLAUGHLIN respectfully oppose the Petition for Writ of Certiorari to review the order denying further review entered by the Iowa Supreme Court in the above-captioned case on December 3, 1993.

OPINIONS BELOW

The Iowa Supreme Court's order denying further review of the Iowa Court of Appeals' ruling, which the Petitioner seeks to review, is unreported and is included in Petitioner's Appendix. The Iowa Court of Appeals' decision affirming summary judgment in favor of the Defendants, dated October 5, 1993, is unreported and is included in the Petitioner's Appendix. The Polk County District Court ruling granting summary judgment to the Defendants as to the Plaintiff's federal law claims dated April 14, 1992 is unreported and is included in the Petitioner's Appendix. The Polk County District Court ruling granting summary judgment as to the Plaintiff's remaining state law claim dated September 25, 1992 is unreported and is included in the Petitioner's Appendix.

JURISDICTION

Jurisdiction in the state trial court below, a court of general jurisdiction, was based on Iowa Code Section 602.6101. The trial court exercised its concurrent jurisdiction over the Plaintiff's federal claims. Jurisdiction in the Iowa Court of Appeals and the Iowa Supreme Court was based on Iowa Code Section 602.4102. The Petition for Writ of Certiorari was filed in this Court on or about March 23, 1994. The Petition apparently seeks review, under U.S. Supreme Court Rule 10(c) and 28 U.S.C. § 1257, of the Iowa Supreme Court's order denying further review.

PROVISIONS OF STATUTES AND RULES INVOLVED

Iowa Code (1989) Section 729.4(1), which provides as follows:

> 1. Every person in this state is entitled to the opportunity for employment on equal terms with every other person. A person or employer shall not discriminate in the employment of individuals because of race, religion, color, sex, national origin, or ancestry. However, as to employment an individual must be qualified to perform the services or work required.

Iowa Code (1989) Section 400.4, which provides in pertinent parts:

> the [Civil Service] commission shall appoint an employee . . . to be clerk of the commission
>
> The civil service commission shall keep . . . a complete individual service record of each civil service employee which record shall be permanent and kept up to date.

Iowa Code (1989) Section 400.8, which provides in pertinent part:

> 1. The [Civil Service] commission shall . . . hold examinations for the purpose of determining the qualifications of applicants for positions under civil service . . . which examinations . . . shall . . . fairly test the mental and physical ability of the applicant to discharge the duties of the position to which the applicant seeks appointment.

Iowa Code (1989) Section 400.11, which provides in pertinent part:

> The [Civil Service] commission shall . . . certify to the city council a list of . . . persons who qualify . . . for the position they seek to fill . . . and all . . . vacancies in positions under civil service . . . shall be filled from said lists . . .

Rules and Regulations Des Moines Civil Service Commission, Chapter IV, Section 6., which provides in part:

> The Commission shall reject an application if the applicant does not possess the minimum qualifications.

Rules and Regulations Des Moines Civil Service Commission, Chapter IX, Section 1., which provides in pertinent part:

> Disciplinary Procedure: The City Manager- . . . may peremptorily suspend, demote or discharge a subordinate then under the person's direction for neglect of duty, disobedience of orders, misconduct, or failure to properly perform the subordinate's duties.

STATEMENT OF THE CASE

1. Facts Pertinent to the Petition.

The Plaintiff's Petition omits relevant facts, includes irrelevant statements, and asserts as fact certain matters which are not true and for which there is no evidential support in the record. These are the undisputed facts which are pertinent to the questions presented in the Petition:

1. The Plaintiff was employed by the City of Des Moines, Iowa from September 25, 1979 to June 28, 1982, as a Senior Building Equipment Operator. This was a Civil Service position. He was terminated from his employment with the City for several reasons, including incompetency, inefficiency and negligence in the performance of his duties, insubordination, falsification of employment applications, and notoriously disgraceful conduct. These reasons are listed in a memo which was attached to the City's Personnel Action Form, which also stated that he was "not recommended" for rehire, in other words, ineligible to be rehired.

2. The Plaintiff filed suit following his termination. This matter was settled in 1986. A release executed in conjunction with this settlement refers to a release of all claims relating to the termination of his employment with the City in 1982 and includes a denial of liability of the Defendants.

3. In 1989, the Plaintiff sought application for another Civil Service position with the City, this time as a plumber. His application was not processed as he was not eligible for rehire by the City under the circumstances of his previous termination.

4. The Plaintiff filed this action pro se, generally complaining that various current or former City employees violated his civil rights under 42 U.S.C. §§ 1983, 1985, 1986 and the Fair Labor Standards Act when he was not hired by the City in 1989. The Plaintiff attached the Personnel Action Form and memo mentioned above to his petition at law.

5. The Defendants initially sought summary judgment based, in part, on the Plaintiff's failure to specifically allege any deprivation of his rights under federal law. The Plaintiff, represented by counsel at this point of the proceedings, agreed that he failed to state a claim under federal law. The trial court granted summary judgment as to the federal claims.

6. The Defendants then sought summary judgment as to the Plaintiff's purported state law claim of "failure to hire" based on his failure to state a claim upon which relief can be granted. The trial court granted this motion for summary judgment, dismissing the Plaintiff's petition in its entirety.

7. The Plaintiff appealed as of right to the Iowa Supreme Court. The case was assigned to the court of appeals. The Iowa Court of Appeals affirmed the trial court's rulings. The Plaintiff applied for further discretionary review by the Iowa Supreme Court. This request was denied on December 3, 1993.

8. The Plaintiff filed a Petition for Writ of Certiorari with this Court on or about March 3, 1994. This Petition was returned by the clerk for failure to follow the proper form. A corrected Petition was filed on or about March 23, 1994.

2. Inaccurate Statements in the Petition

The Plaintiff's Questions Presented, List of Parties, summaries of Statutory Provisions, Statement of the Case and Reasons Supporting Issuance of the Writ contain

inaccurate statements of fact and law and are misleading in several particulars.

The Plaintiff's List of Parties states that he, Francis Picray, is an eligible individual. He was and is ineligible for employment with the City of Des Moines. The List aiso states that William McLaughlin was hired to discharge Picray. That statement is unsupported by any reliable evidence.

The Plaintiff's summary of Statutory Provisions contain misstatements of Iowa law regarding equal opportunity for employment and civil service requirements. Iowa Code Section 729.4(1) pertains to persons who are qualified for a particular position. The statutes and rules pertaining to civil service applications allow the commission, through its clerk, to reject an application.

The Plaintiff's Statement of the Case refers in part to factual matters that are not supported by the record and appear to be misleading in several particulars. For example, at p. 5 he states that the memo or letter attached to the Personnel Action Form contained untrue and unfounded allegations. This statement is apparently his personal opinion, is not supported by any evidence in the record, and was the subject matter of previous litigation. At p. 7 he refers to public criticism as the reason for his termination. These statements are not supported by any evidence in the record. He also states that damage for defamation was included in the settlement of the first litigation. The release form that he refers to does not include any admission of liability or specify payment for defamation.

REASONS FOR DENYING THE PETITION

The issues raised in the Petition do not raise any important question of denial of federal due process that justifies consideration by this Court. In fact, as the record reveals, the Plaintiff has made use of all avenues available for the process of litigation to pursue his complaints. He appealed the Civil Service Commission decision ratifying his termination in 1982. He also filed a lawsuit in state court at about that time generally complaining of the same issues. That litigation reached a full and final disposition by settlement in 1986.

Following his apparent dissatisfaction with the processing of his job application in 1989, he filed suit in 1991. He continues to raise some of the same issues that were settled in the earlier litigation. The new issues raised in this lawsuit received a full hearing at the time of the motions for summary judgment and were ruled upon by the trial court. The Plaintiff had the opportunity to further process of law on appeal to present his arguments. The mere fact that the Plaintiff was unsuccessful on his claims certainly cannot mean that he was denied due process under the Constitution as interpreted by this Court.

Similarly, the issues raised in the Petition do not raise any important question of federal equal protection that deserves consideration by this Court. The Plaintiff, a white male, is not a member of any protected class. The reasons his application was not processed in 1989 were entirely personal to him, relating to his behavior during his previous employment as specified in the memo attached to the Personnel Action form. As this Court held

more than fifty years ago, employers are generally free to select employees at will. *NLRB v. Jones and S. Laughlin Corp.*, 301 U.S. 1, 45 (1937). This general principle still holds true. *Rayburn v. Equitable Life Assurance Society*, 805 F.Supp. 1401, 1403 (S.D. Texas 1992); *Smith v. American Greetings Corp.*, 804 S.W. 2d 683, 684 (Ark. 1991); *U.S. Steel Corp. v. Nichols*, 229 F.2d 396, 399 (6th Cir. 1956).

In addition, under Iowa law, an appellant cannot raise a new theory of recovery for the first time on appeal. *Cole v. First State Bank of Greene*, 463 N.W. 2d 59, 63 (Iowa 1990). The Plaintiff raised the equal protection argument for the first time on appeal to the Iowa Court of Appeals. He is raising the federal due process claim for the first time in this Petition. He cannot continue to attempt to raise new theories for recovery on each successive appeal. Under the actual facts of this case, the Plaintiff simply fails to state a claim upon which relief can be granted under any theory.